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No. 79-1171

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF MINNESOTA,

Petitioner,

vs.

CLOVER LEAF CREAMERY COMPANY, PHILLIPS PETROLEUM COMPANY, MARIGOLD FOODS, INC., UNILOY DIVISION OF HANOVER UNIVERSAL, INC., WEBER & BARLOW STORES, INC., THE SOCIETY OF THE PLASTICS INDUSTRY, INC., WELLS DAIRY, INC. and M-H PACKAGING SYSTEMS, INC.,

Respondents.

On Writ of Certiorari to the Minnesota Supreme Court

BRIEF AMICUS CURIAE BY THE MINNESOTA DAIRIES FEDERATION

MICHAEL L. FLANAGAN
MOSS, FLAHERTY, CLARKSON & FLETCHER, a Professional Association
2350 IDS Center
Minneapolis, Minnesota 55402
Telephone: (612) 339-8551

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BRIEF FOR THE MINNESOTA DAIRIES FEDERATION AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Did the Minnesota Supreme Court correctly hold that the statutory ban on the sale of milk in non-returnable, non-refillable plastic containers violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. Does the statutory ban on the sale of milk in non-returnable, non-refillable plastic containers discriminate against or unreasonably burden interstate commerce in violation of Article 1 of Section 8 of the United States Constitution?

INTEREST OF THE MINNESOTA DAIRIES FEDERATION

This brief of *amicus curiae* is filed with the consent of all parties in the case.

The Minnesota Dairies Federation is composed of 18 members, all of which are dairies doing business in the state.[1] Many members of the Minnesota Dairies Federation sell milk and other dairy products in North Dakota, South Dakota, Iowa, and Wisconsin as well as Minnesota. Members also compete with out-of-state dairies in Minnesota markets. The Minnesota Dairies Federation represents all of the major dairies in Minnesota. There are four or five producer-handlers which are not members, but they produce less than 3% of the milk volume sold in Minnesota. Another 5% to 10% of the milk sold in Minnesota comes from out-of-state dairies which are not members.

This case concerns the constitutionality of a Minnesota statute which bans the sale of milk in non-returnable, non-refillable plastic containers. Because milk is a highly standardized commodity, the type of packaging used for milk is one of the principal areas of competition among dairies. Packaging can improve filling and transportation efficiency, decrease operating costs, enhance sanitation and product safety, and increase consumer acceptance and sales.

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[1] Two members of the Minnesota Dairies Federation, Clover Leaf Creamery Company and Marigold Foods, Inc., are plaintiffs in the instant case. Seven other members appeared as *amici* in support of the State's motion to dismiss at a pre-trial hearing. Their argument was simply that a prompt resolution of the case would be advantageous to them economically. Some of them now buy plastic bottles from Clover Leaf and M-H Packaging Systems, Inc. another plaintiff-respondent. The membership vote on participation in the case as an *amicus* was unanimous.

In the Minnesota market, non-refillable paperboard containers virtually eliminated refillable glass containers many years ago because of advantages in transportation efficiency, sanitation and safety, and reduced operating expenses. (R. 155.) Consumers also preferred the light weight and ease of handling of the paperboard container.

During the last ten years, the plastic container has been challenging the paperboard container in the area of milk packaging. The dairies and consumers have strongly approved of the plastic container because of its resistance to breakage, its even lighter weight (60-65 grams versus 115 grams), its resealable screw-on or snap-on cap, and its built in handle which makes carrying and pouring comparatively easy.

Members of the Minnesota Dairies Federation have been using plastic containers since the late 1960's (R. 353-354). Most of those members using the plastic milk container purchased the bottles from manufacturers in Illinois and Minnesota and filled the containers on converted paperboard filling lines. Several companies have, however, purchased machines for the manufacture of their own bottles in the dairies, and have invested substantial amounts of money in those operations. (R. 332, 421, 449.) Where sufficient volume exists, the dairy which manufactures its own plastic containers can reduce its packaging costs. The Minnesota Dairies Federation members have a strong interest in the markets which have been developed over the years through the use of the plastic milk container and in protecting the investments made in equipment and plant facilities.

A ruling by this Court upholding the statutory ban on the sale of milk in plastic containers in the State of Minnesota would remove the principal item of competition between dairies in Minnesota and impair their ability to compete successfully in the surrounding states. Ultimately, the consumers of Minnesota and the surrounding states will suffer since they will not have the advantage of competition between dairies, and the benefits, economic or otherwise, that competition produces.

STATEMENT

During its 1977 session, the Minnesota Legislature enacted 1977 Minn. Laws Ch. 268, codified as Minn. Stat. § 116f. 21 and § 116f.22. That statute banned the sale of milk in non-returnable, non-refillable rigid or semi-rigid plastic milk containers in the State of Minnesota. Sour cream, cottage cheese, and yogurt were products specifically exempted from the statutory ban. Other drinks such as fruit juices, carbonated beverages, and other non-dairy drinks were not affected. Soft drinks have been sold in Minnesota in plastic bottles since January, 1980. To date, no legislative or regulatory action has been proposed or taken to restrict the use of any of those plastic containers.

The Respondents challenged the constitutionality of the ban on the sale of milk in plastic containers. After a full evidentiary hearing on the matter, the trial court concluded that the statute violated the Commerce, Due Process, and Equal Protection clauses of the United States Constitution. The Supreme Court of the State of Minnesota affirmed the trial court's decision on equal protection grounds without addressing the other issues.

After a detailed review of the facts concerning the legislative background and environmental impact of plastic containers, both the trial court and the Minnesota Supreme Court concluded that the ban on plastic did not further the Act's goal of encouraging the use of refillable milk containers and that the plastic containers were no worse, and in many instances, superior to, the paperboard environmentally. The Court concluded that while a legislature may attempt to remedy a perceived problem one step at a time, the initial step must have a rational relationship to a legitimate state interest and the ban on plastic did not.

SUMMARY OF ARGUMENT

The arguments concerning the statute's violation of the Equal Protection Clause of the U.S. Constitution can be best presented to this Court by the Respondents. Suffice it to say for purposes of this discussion that in reviewing the available data on environmental impacts of milk container systems, the Minnesota Dairies Federation has concluded that the 60 to 65 gram container which is presently being used by our members in the State of Minnesota and in the surrounding states to which they market (R. 245, 285, 341, 453) appears to have several environmental advantages over the paperboard container, e.g., light weight, recyclability and land-fill stability, and is equal to, if not better than, paperboard in practically all other impact categories. The members of the Minnesota Dairies Federation did not originate and continue the use of the plastic milk container with the belief that it would ravage the environment of our state. The trial court and the Minnesota Supreme Court have reached the same conclusion and the evidence introduced at trial strongly supports those results.

The principal concern of the Minnesota Dairies Federation is the effect which the ban on the sale of milk in plastic containers would have on the ability of its members to compete in interstate markets. The Commerce Clause of the U.S. Constitution has been interpreted by this Court to forbid the promotion of local economic interests when affected by discrimination against interstate commerce. In the instant case, the legislature's discriminatory motive is apparent in its legislative history and in the effect of the Act which overtly blocks the free flow of interstate commerce at the Minnesota border by prohibiting the sale of milk in plastic containers.

Even if the statute were assumed to regulate evenhandedly to effectuate a legitimate local public interest, the burden which the ban on plastic containers imposes on the Minnesota milk industry is clearly excessive in relation to the putative local benefits. In banning the sale of milk in plastic

containers, the statute removes a principal element of competition among Minnesota dairies, hinders Minnesota dairies in marketing their products in other states, and places Minnesota dairies in an unfair competitive position with items such as fruit juices, carbonated beverages and other drinks which can be sold in plastic containers.

ARGUMENT

THE STATE OF MINNESOTA'S BAN ON THE SALE OF MILK IN NON-RETURNABLE, NON-REFILLABLE PLASTIC CONTAINERS VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

This Court has indicated that the tests to be applied to a statute which is challenged under the Commerce Clause are first, a virtually *per se* rule of invalidity which is applied to statutes that affect economic protectionism; and second, a more flexible rule commonly referred to as the balancing test, which is applied to statutes which do not have as their object the obstruction at a state's borders of the free flow of commerce. *City of Philadelphia v. New Jersey,* 437 U.S. 617, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978). *Lewis v. BT Investment Managers, Inc.,* ____ U.S. ____, 100 S. Ct. 2009 (1980). We submit that under either of these rules, the ban on the sale of milk in plastic containers in Minnesota is unconstitutional.

While it is unusual to find such statements of legislative motive, Representative Munger, the sponsor of the Bill in the House of Representatives, clearly stated that he had not considered the environmental impacts of the plastic container, *viz a viz* the paperboard and, instead, pointed to the evils of the out-of-state plastic industry and the need to protect local business. (R. 119-121.) In the debates that occurred in the House and Senate, legislators repeatedly referred to the protection of the Minnesota timber and pulp industry (R. 115, 122, 125) and the Bill was characterized as economic rather than environmental on several occasions. (R. 121-122, 124, 129-130.)

A quote from Representative Munger is especially telling with regard to his hostility toward interstate interests:

> I don't think we need to have anybody from New York in the plastics industry come in here and tell us farmers how to farm. We don't need anyone to come in here to farm the farmer. (R. 112-113.)

Both the protectionist motive and the practical effect of the ban on the sale of milk in plastic containers discriminate against those doing business in interstate goods. A Minnesota dairy which manufactures its own plastic containers and sells its milk in those containers can do business in Wisconsin, but must change its entire system to be able to sell its product in its home state of Minnesota. Without home state sales to provide volume, interstate sales in plastic containers become too expensive. With the return to an all paperboard packaging system in Minnesota, the out-of-state dairy with the plastic container would have the competitive edge in the interstate market.

Even on an intrastate basis the statutory ban on the sale of milk in plastic containers discriminates against the milk producer. While milk cannot be sold in plastic containers, fruit juices and soft drinks can, and are, being sold in the State of Minnesota in plastic containers. Milk competes with both fruit juices and soft drinks in the Minnesota market. The arbitrary barrier of the ban on the sale of milk in plastic containers would prevent members of the Minnesota Dairies Federation from effectively competing against these products in either Minnesota or out-of-state markets.

Assuming, without conceding, for the sake of argument that the statute was intended to effect a legitimate local interest, the ban on the sale of milk in plastic containers should not be upheld because the burden it imposes on interstate commerce is extreme when compared to the supposed local benefits it would create.

This Court has stated that even where a statute regulates even-handedly to effectuate legitimate local public interest, it will not be upheld if the burden imposed on commerce is

clearly excessive in relation to the local punitive benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The effects on interstate commerce in the instant case are great while the local benefits are zero, if not a negative factor.

Those members of the Minnesota Dairies Federation which manufacture plastic bottles and sell their milk in plastic containers would be required to stop all production and sales for use in Minnesota, their largest markets. The result, in most cases, would be to make the use of such a packaging system so uneconomical that it would be a financial burden and have to be scrapped. The economic loss to those dairies would be substantial. With the loss of the economic advantage of an in-house packaging system, competition in interstate markets with out-of-state dairies using plastic containers would become difficult, if not economically unfeasible. On an intrastate basis, the marketing advantage of fruit juices and beverage containers sold in plastic containers will place local dairies at a further disadvantage.

Due to the long standing and wide spread use of plastic milk containers, the economic costs which would be incurred in changing from the plastic to the paperboard system on a statewide basis would be in excess of $5,000,000. The loss in interstate milk sales due to the handicap in competition with out-of-state dairies and the loss in intrastate milk sales to competition from other drinks would be certain, but are inestimable. The net effect on the Minnesota dairy industry, however, is to restrict its milk sales to the borders of the state.

If the ban on the sale of milk in plastic containers took effect at this time, a major portion of the Minnesota milk industry would be required to shut-down, greatly reducing the supply of milk to consumers. Over 50% of the milk now sold in Minnesota is in plastic gallon containers. The conversion from a plastic to a paperboard packaging system requires machinery retooling which can be expected to take from six to twelve months due primarily to the availability of parts. The ban would thus create an artificial milk shortage while the dairies converted their packaging systems.

With regard to the local benefits which may be obtained, those Minnesota dairies which use the plastic container system would return to the non-returnable, non-refillable paperboard carton which they had used before. Most dairies do not have the facilities to wash refillable bottles and regulatory restrictions on the sewage generated in bottle washing make it questionable that refillables could even be used if mandated on a statewide basis. (R. 424-425, 454-455.) The result is that paperboard containers will replace plastic containers in the market they have occupied throughout the State of Minnesota. Replacing a non-refillable, but recyclable plastic container with a non-returnable, non-refillable paperboard container is not, in our view, a local benefit. There is absolutely nothing about a ban on the sale of milk in plastic containers which encourages or in any way promotes the use of refillable containers and there appear to be no other legitimate local benefits.

CONCLUSION

In consideration of the foregoing reasons, we respectfully submit that the decision of the Minnesota Supreme Court should be affirmed.

Respectfully submitted,

MICHAEL L. FLANAGAN
MOSS, FLAHERTY, CLARKSON & FLETCHER, a Professional Association
Attorneys for the Minnesota Dairies Federation
2350 IDS Center
Minneapolis, MN 55402
Telephone: (612) 339-8551